HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BOILERMAKERS NATIONAL ANNUITY TRUST FUND, on behalf of itself and all others similarly situated, Plaintiff, v. WAMU MORTGAGE PASS THROUGH CERTIFICATES, SERIES 2006-AR1, et al., Defendants.	Master Cause NO. 2:09-cv-00037-MJP **LEAD PLAINTIFFS' RESPONSE IN OPPOSITION TO WAMU DEFENDANTS' MOTION TO DISMISS** Noted on Motion Calendar: May 28, 2010
DORAL BANK PUERTO RICO, on behalf of itself and all others similarly situated, Plaintiffs, v. WASHINGTON MUTUAL ASSET ACCEPTANCE CORPORATION, et al., Defendants.	NO. 2:09-cv-01557-MJP **ORAL ARGUMENT REQUESTED**

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

TABLE OF CONTENTS

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

TABLE OF AUTHORITIES

Page(s)

CASES

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

I. PRELIMINARY STATEMENT

This securities class action arises from Defendants' sale of WaMu Mortgage Pass-through Certificates (the "Certificates") using offering documents (the "Offering Documents") that contained misstatements and omitted material facts. Lead Plaintiffs Doral Bank of Puerto Rico ("Doral Bank") and Policemen's Annuity Benefit Fund of the City of Chicago ("PABF Chicago") ("Lead Plaintiffs"), purchasers of the Certificates, assert claims for violations of Sections 11, 12(a)(2) and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77l(a)(2) and 77o (the "Securities Act") against WaMu Asset Acceptance Corporation ("WMACC"), WaMu Capital Corporation ("WCC") and Individual Defendants Rolland Jurgens, Richard Careaga, Thomas Lehmann, Steven Fortunato, Donald Wilhelm, Diane Novak, and David Beck (collectively, "WaMu Defendants") and the Rating Agencies that controlled the structuring process and were necessary participants in distributing the Certificates and who are therefore liable as control persons.[1,2]

Washington Mutual Bank ("WMB") was a major participant in all aspects of the lucrative market for mortgage-backed securities. From January 26, 2006 and June 26, 2007, the WaMu Defendants securitized and sold over $47.25 billion of Certificates pursuant to two Registration Statements: WMAAC Registration Statement dated December 30, 2005 (SEC File No. 333-134461), thereafter amended on January 6, 2006 on pre-effective Registration Statement Form S-3/A (the "2006 Registration Statement") and WMAAC Registration Statement dated March 13, 2007 (SEC File No. 333-141255), thereafter amended on April 9, 2007 on pre-effective Registration Statement Form S-3/A (the "2007 Registration Statement")

[1] Each of the Individual Defendants signed at least one of the Registration Statements for the offerings detailed in the Second Amended Consolidated Complaint ("Complaint"), ¶¶27-34.

[2] "Rating Agencies" refers to McGraw-Hill Companies, a division of which is Standard & Poor's ("S&P"), and Moody's Investors Service, Inc. ("Moody's"). The Rating Agencies filed a separate motion to dismiss ("RA Mot.") [Dkt. No. 168] and Lead Plaintiffs are filing a separate brief in opposition herewith.

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

(collectively, the "Registration Statements").[3] ¶1.[4] WMB established WMAAC, which acquired and securitized loans for resale to investors in the form of the Certificates. ¶¶24-26. The Certificates were then sold to investors only after being bestowed investment-grade ratings by the Rating Agencies. ¶¶42-43, 91-97. More than 93% of the Certificates were initially rated triple-A. ¶11. In the months after each of the 36 Offerings the delinquency and default rates on the mortgage collateral underlying each Certificate increased exponentially and the Rating Agencies downgraded over 98.9%, or $46.8 billion, of the Certificates to "junk bond" grade. ¶13.

As set forth below, the Offering Documents purported to accurately describe the loans underlying the Certificates and, thus, the safety of the investment. However the Offering Documents contained misstatements and omitted material facts that were necessary to make statements therein not misleading. For example, the Offering Documents claimed that "[t]he sponsor's underwriting guidelines generally are intended to evaluate the prospective borrower's credit standing and repayment ability and the value and adequacy of the mortgaged property as collateral." ¶143. In truth, as alleged in the Complaint, WMB, in its drive to increase loan volume, systematically disregarded underwriting guidelines. ¶8. WaMu Defendants turned a blind eye to this, as well as manipulated appraisals, of the underlying properties, in securitizing the Certificates. ¶¶8, 84, 133. The Complaint also charges that the Offering Documents contained additional misstatements and omissions regarding the credit ratings assigned to the Certificates. The Complaint's allegations are well supported by, among other facts, witness accounts and internal documents. Lead Plaintiffs have alleged reliable, contemporaneous facts that collectively demonstrate the misstatements and omissions in the Offering Documents. As shown herein, nothing more is required at the pleading stage.

[3] The Registration Statements, Prospectuses and Prospectus Supplements are referred to collectively herein as the "Offering Documents."

[4] "All "¶" and "¶¶" references are to the Second Amended Consolidated Complaint.

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

WaMu Defendants attempt to blame the "economic downturn" for the rates of loss, delinquencies and foreclosures in the loan pools underlying the Certificates. WaMu Defendants' Motion to Dismiss ("WaMu Mot.") [Dkt. No. 170]. If WaMu Defendants wish to attempt to blame other factors, they may do so at trial. This contention is not a ground for dismissal. At this stage, "[i]t is not the Court's role to speculate on the causes of the current economic situation." *In re Countrywide Fin. Corp. Sec. Litig*., 588 F.Supp.2d 1132, 1173-74 (C.D. Cal. 2008) (rejecting defendants' argument that mortgage lender suffered losses due to "an 'unprecedented' external 'liquidity crisis' and 'other macroeconomic arguments'"). In truth, originating and packaging risky mortgages and selling them to investors as Certificates was a high-margin business for WMB and WaMu Defendants. ¶¶52-54, 87-90. Through the Offering Documents, WMB and WaMu Defendants transferred the risk of toxic loans to investors, including public pension funds, while profiting handsomely. ¶¶87-90. WaMu Defendants were obligated by law to fully disclose the nature of the risk, including the quality of the underwriting, appraisals and loan-to-value ratios of the loans, and did not.

WMAAC, acting at the direction of WCC and the Rating Agencies, sold over $47.25 billion of Certificates to investors in 36 different Offerings pursuant to the Offering Documents. ¶¶2, 39. The Certificates were sold primarily to conservative institutional investors, such as Lead Plaintiffs here, who purchased the Certificates as purportedly "maximum safety," investment-grade investments. ¶12. As detailed in the Complaint, the Offering Documents contained misstatements of material fact, or omitted to state material facts necessary to make the statements therein not misleading, regarding, among other things: the underwriting standards purportedly used in connection with the origination of the underlying mortgages; the maximum loan-to-value ratios used to qualify borrowers; the appraisals of the properties underlying the mortgages; and the ratings of the Certificates. ¶¶16, 136-171.

The facts that were omitted from the Offering Documents were that: (1) WMB, its affiliates and correspondent lenders had not followed, and indeed, systematically disregarded,

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

the stated underwriting standards when issuing loans to borrowers; (2) the underlying mortgages were based on appraisals that overstated the value of the underlying properties; and (3) the credit ratings given to the tranches of the Certificates were based on outdated assumptions, relaxed ratings criteria and inaccurate loan information. As a result, Lead Plaintiffs and the Class purchased Certificates that were far riskier than represented and were not of the "best quality," or even "medium credit quality," and were not equivalent to other investments with the same credit ratings. ***Rating agencies have now downgraded nearly all of the Certificates***. ¶¶13, 103.

Before the proliferation of mortgage-backed securities, loan originators had financial incentives to use prudent underwriting practices to ensure that the borrower had the ability to repay the note and that the underlying property was sufficiently valuable to serve as collateral. ¶46. When securitizations of mortgage loans became more widespread, however, this traditional model gave way to an originate-to-sell model. *Id.* Under this model, originators were no longer required to hold risky mortgages to maturity, and the credit risk was instead transferred to investors. *Id*. Loan fees and sales revenue became the originator's primary profit mechanism, making the sheer quantity of loans more important than the quality of the loans.

The Rating Agencies rated the Certificates. ¶¶4, 7, 59, 112-15, 119. Ratings, which allow investors to compare the risk profiles of different investments in order to determine equivalent levels of risk, are supposed to be objective and independent. ¶¶4, 11, 42-43. Moody's highest investment rating is "AAA"; S&P's highest rating is "AAA". ¶11. These ratings signify the highest investment-grade, are considered to be of the "best quality," and are supposed to carry the smallest degree of investment risk. Most institutional investors, such as banks, mutual funds and public pension funds, are required to purchase and hold only "investment-grade" instruments and securitized interests. ¶12. Thus, it was a condition to the issuance of the Certificates that they receive certain, specified ratings from the Rating Agencies. *Id*. Indeed, the Rating Agencies include their proposed ratings as part of their bid

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

for the rating engagement, in a process called "ratings shopping." ¶91. Moreover, the Rating Agencies intentionally used outdated rating models, based on pre-subprime era data, to enable them to award the highest ratings to the Certificates. ¶¶105-113. Ratings shopping and the use of outdated analysis tools resulted in over 93% of the Certificates being awarded triple-A ratings. Accordingly, the Certificates' ratings were unjustifiably high. The Offering Documents failed to disclose these facts. *Id.*

Nonetheless, WaMu Defendants issued billions of dollars worth of Certificates pursuant to two Registration Statements and their respective Prospectus Supplements. Accordingly, WaMu Defendants undertook strictly liability for misstatements in the documents as, under Sections 11 and 12 of the Securities Act (15 U.S.C. §§ 77k, 771), liability for misstatements is "'virtually absolute, even for innocent misstatements.'" *In re Metropolitan Sec. Litig.*, No. 04 Civ. 25, 2010 WL 300402, at *1 (E.D. Wash. Jan. 20, 2010) (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983) and citing 15 U.S.C. § 77k(b)). Section 11 of the Securities Act "was designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering." *Herman*, 459 U.S. at 381-82. Section 12(a)(2) of the Securities Act similarly holds sellers of securities liable for misstatements in a prospectus. *In re Fuwei Films Sec. Litig.*, 634 F.Supp.2d 434 (S.D.N.Y. 2009). The statute is clear: Lead Plaintiffs need only allege a false statement and claim a loss, and any mitigation of that loss is a defense left for summary judgment or trial. 15 U.S.C. § 77k. Contrary to WaMu Defendants' arguments, the Securities Act damages provisions may not be waived by language in the Offering Documents themselves. 15 U.S.C. § 77n. Additionally, under applicable federal law, Lead Plaintiffs in this action may represent ***all*** investors who purchased the Certificates.

II. ARGUMENT

A. The Standard on Motion to Dismiss

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

In assessing Lead Plaintiffs' Complaint, the Court must accept the plaintiffs' allegations as true and construe them in the light most favorable to Lead Plaintiffs. *In re Daou Sys*., 411 F.3d 1006, 1013 (9th Cir. 2005). Where, as here, the claims are subject to a Rule 8(a) pleading standard, dismissal is appropriate only if, viewed in its totality, a complaint fails to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007); *see also Moss v. U.S. Secret Serv*., 572 F.3d 962, 969 (9th Cir. 2009) (to survive a motion to dismiss, a complaint "must be plausibly suggestive of a claim entitling the plaintiff to relief").

The Supreme Court clarified the contours of the "plausibility" requirement in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009). According to *Iqbal*, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 1949. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. Notably, the Court is not required, at this stage, to believe Plaintiffs' allegations. *Twombly*, 550 U.S. at 556 (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance … dismissals based on a judge's disbelief of a complaint's factual allegations."). Indeed, even if a complaint "strikes a savvy judge that actual proof of [its] facts is improbable" and "that a recovery is very remote and unlikely," all *Twombly* requires is "enough fact to raise a reasonable expectation that discovery will reveal evidence" of wrongdoing. *Id*. Plaintiffs must only "nudge[] their claims across the line from conceivable to plausible." *Id*. at 570. As discussed herein, the Complaint's allegations readily satisfy this standard.[5]

[5] Defendants improperly seek "judicial notice" of SEC filings and other public documents to introduce disputed facts into the record, and then, on the basis of these disputed facts, assert that Lead Plaintiffs' allegations should not be accepted as true. WaMu Mot. at 6-8, 9, 16-17, 19, 23, 27, 30, 32-33, 35-37, 40. Under Ninth Circuit law, the Court may not take "judicial notice of disputed facts stated in public records." *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001); *see also In re Adaptive Broadband Sec. Litig*., No. 01-1092 2002 WL 989478, at *20 (N.D. Cal. Apr. 2, 2002) (same as to SEC filings). The reason for this is a good one: "The Court should not use judicial notice to generate an evidentiary record and then weigh evidence - which plaintiffs have

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

B. Lead Plaintiffs Have Standing to Bring This Action

1. WaMu Defendants' Challenge to Lead Plaintiffs' Standing Is Premature

WaMu Defendants argue that, even though Lead Plaintiffs purchased Certificates that were issued pursuant to both the Registration Statements at issue in this lawsuit, they lack standing to sue under Sections 11 and 12(a)(2) of the Securities Act on behalf of all investors who purchased Certificates that were issued pursuant to the Registration Statements. This argument fails because it is premature to raise on a motion to dismiss, and is more appropriately raised and addressed during the class certification phase of the case. *See, e.g., In re Global Crossing, Ltd. Sec. Litig.*, 313 F.Supp.2d 189 (S.D.N.Y. 2003).

As the *Global Crossing* court explained:

> [N]othing in the PSLRA requires that the lead plaintiffs have standing to assert all of the claims that may be made on behalf of all of the potential classes and subclasses of holders of different categories of security at issue in the case. Indeed, the imposition of any such requirement would be at odds with the purposes of the statute, since in the case of large alleged frauds involving issuers of many classes of securities, the consequence would be either the appointment of a large number of lead plaintiffs (undermining the goal of a cohesive leadership and management group) or the premature breakdown of the action into an unmanageable number of separate cases brought by different lead plaintiffs on behalf of each potential subclass of securities holders.

Id. at 204-05; *see also Hevesi v. Citigroup, Inc.*, 366 F.3d 70, 82 n.13 (2nd Cir. 2004) ("[A]ny requirement that a different lead plaintiff be appointed to bring every single available claim would contravene the main purpose of having a lead plaintiff – namely, to empower one or several investors with a major stake in the litigation to exercise control over the litigation as a whole"); *In re Initial Pub. Offering Sec. Litig.*, 214 F.R.D. 117, 123 (S.D.N.Y. 2002) ("The only other possibility–that the court should cobble together a lead plaintiff group that has

---

not had the opportunity to challenge - to dismiss plaintiffs' complaint." *In re Network Equip. Techs., Inc. Litig.*, 762 F.Supp. 1359, 1363 (N.D. Cal. 1991).

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

standing to sue on all possible causes of action–has been rejected repeatedly by courts in this Circuit and undermines the purposes of the PSLRA.").

Rather than requiring Lead Plaintiffs to have standing to bring every single claim on behalf of every class and subclass of securities holders, courts have allowed additional named plaintiffs to intervene prior to class certification in order to cure any potential deficiencies in class representation. *See Hevesi*, 366 F.3d at 82-83 (affirming district court's decision to allow lead plaintiff to add additional named plaintiffs where lead plaintiff did not have standing to bring every available claim); *Initial Pub. Offering*, 214 F.R.D. at 122-23 (granting lead plaintiff leave to add new named plaintiffs for purposes of conferring standing prior to class certification). Thus, WaMu Defendants' claim that Lead Plaintiffs lack standing to assert claims on behalf of all investors who purchased Certificates pursuant to the Registration Statements at issue in this case is premature and is more appropriately addressed at the class certification phase of this case. *See In re Countrywide Fin. Corp. Sec. Litig.*, 588 F.Supp.2d 1132, 1167 (C.D. Cal. 2008) ("The well-developed class certification framework will better guide this inquiry and lead to more efficient resolution of the class claims than standing's sometimes-arbitrary distinctions."); *In re Dreyfus Aggressive Growth Mut. Fund Litig.*, Civ. No. 98-4318, 2000 WL 1357509, at *3 (S.D.N.Y. Sept. 20, 2000) ("Courts have not addressed this concern vis-à-vis the doctrine of standing, but rather have examined such concerns pursuant to Rule 23(a)(3)'s typicality requirement."); *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 718 n.22 (3d Cir. 1996) ("While these [standing] concerns might be relevant on a motion for class certification, they do not address whether, as a threshold matter, plaintiffs properly stated a [Section 12(a)(2)] claim under Rule 12(b)(6).").

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

2. Lead Plaintiffs Have Adequately Alleged Standing to Sue on Behalf of Purchasers of All Certificates that Were Issued Pursuant to the Registration Statements at Issue in this Lawsuit

WaMu Defendants' standing argument also fails because Lead Plaintiffs have adequately alleged standing to sue on behalf of all purchasers of the Certificates that were issued pursuant to the Registration Statements at issue in this case. Indeed, Section 11, by its own terms, confers standing on any person acquiring a security where "any part of the ***registration statement***, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statement therein not misleading." 15 U.S.C. § 77k (emphasis added). Here, WaMu Defendants concede that Lead Plaintiffs purchased Certificates pursuant to the 2005 and 2007 Registration Statements, which are the only Registration Statements at issue. WaMu Defendants also concede that every Certificate at issue in this case was issued pursuant to either the 2005 or 2007 Registration Statement. Thus, Lead Plaintiffs have standing to assert Section 11 claims on behalf of all class members who purchased Certificates in reliance on the false and misleading statements in the Registration Statements.

The *Countrywide* opinion is on point. There, the district court analyzed the identical standing issue presented here and determined that the plaintiffs had alleged sufficient Section 11 standing to survive a motion to dismiss:

> The statue contemplates the possibility that the "registration statement" in first clause of § 11 is not the same in every respect as the "registration statement" for a particular security because "parts" of the "registration statement" may "bec[o]me effective" at different times. 15 U.S.C. § 77k(a) ("[A]ny part of the registration statement, *when such part became effective . . .*"). To require that "registration statement" of § 11's first clause be absolutely identical for each security traceable to the same initial registration and prospectus would rewrite "such part" to read "registration statement." *See also* 15 U.S.C. § 77b (defining registration statement "*unless the context otherwise requires*"). ***The statute grants standing to anyone who buys "such security" – one traceable to a defective registration statement.*** *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076 (9th Cir. 1999). ***If the initial shelf registration statement contained an actionable statement or omission that is common to more than one issuance***

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

under the shelf registration, then purchasers in those issuance may be able to trace the same injury to the same "registration statement."

588 F.Supp.2d at 1166 (emphasis added). The *Countrywide* court then held: "[s]o long as (1) the securities are traceable to the same initial shelf registration and (2) the registration statements share common 'parts' that (3) were false and misleading at each effective date, there is § 11 standing." *Id.*; *see also In re Worldcom, Inc. Sec. Litig.*, Civ. No. 02-3288, 2004 WL 555697, at *7 (S.D.N.Y. Mar. 19, 2004) (holding that purchasers of one type of debt security had standing to pursue claims on behalf of purchasers of a second type of debt security so long as both securities were issued pursuant to the same registration statement); *In re Fleming Cos. Sec. & Derivative Litig.*, Civ. No. 03-MD-1530, 2004 WL 5278716, at *49 (E.D. Tex. June 16, 2004) ("[C]ase law hold that purchasers of one type of security have standing to sue on behalf of purchasers of other types of security issued pursuant to a single registration statement."). Accordingly, there is no merit to WaMu Defendants' claim that Lead Plaintiffs lack standing to pursue the Section 11 claims on behalf of all purchasers of Certificates that were issued pursuant to the Registration Statements at issue in this case.

3. Lead Plaintiffs Have Standing to Pursue Their § 12(a)(2) Claims Against WCC

WCC goes on to challenge Lead Plaintiffs' statutory standing to assert their Section 12(a)(2) claims. Section 12(a)(2) of the Securities Act imposes liability on any person who "offers or sells a security . . . by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements . . . not misleading . . . " 15 U.S.C. § 771(a)(2); *see also Gustafson v. Alloyd Co.*, 513 U.S. 561, 582 (1995). A defendant is liable as a "seller" under § 12(a)(2) if it "passed title, or other interest in the security, to the buyer for value," or "successfully solicits purchase of securities, motivated at least in part by a desire to serve his own financial interests or those of the securities owner." *Pinter v. Dahl,* 486 U.S. 622, 647 (1988).

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

Here, WCC argues that the Section 12(a)(2) claims should be dismissed because Lead Plaintiffs have not alleged that they purchased the Certificates directly from WCC in the Offerings. WCC makes this argument even though it is well-established that a plaintiff need not allege a direct purchase from an underwriter against whom it has brought a Section 12(a)(2) claim. *See, e.g., In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 283 (S.D.N.Y. 2003) ("Since [plaintiff] purchased its bonds during the [offering], [plaintiff] would have standing to bring a § 12(a)(2) claim against any underwriter [in the offering]."). Indeed, when a plaintiff acquires the securities in the same offerings in which the firm commitment underwriter defendant sells those securities to the public, this is sufficient to establish Section 12(a)(2) standing because it creates "[a] reasonable inference that plaintiffs acquired their securities from the [exact] [u]underwriter [d]efendants" they sued. *In re Scottish Re Group Sec. Litig.*, 524 F.Supp.2d 370, 399-400 (S.D.N.Y. 2007); *see also In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 352 F.Supp.2d 429, 456-57 (S.D.N.Y. 2005) (allegations that shares were purchased in IPO in which Citigroup served as the lead underwriter were sufficient to state § 12(a)(2) claim); *Schoenhaut v. Am. Sensors*, 986 F.Supp. 785, 790 n.6 (S.D.N.Y. 1997) ("plaintiffs need not specify which underwriter sold securities to each plaintiff" to establish "a buyer-seller relationship" sufficient for Section 12(a)(2) standing) (quoting *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 715-16 (3d Cir. 1996)).

The Complaint alleges that WCC sold the Certificates as part of the Offerings, and that Plaintiffs acquired the Certificates sold as part of those Offerings. ¶¶25-39. No more specificity is required under Rule 8. *See Scottish Re.*, 524 F.Supp.2d at 400 (holding that the "Complaint adequately alleges that defendants, including the Underwriter Defendants, sold the securities as part of the Offerings, and Plaintiffs acquired securities in the Offerings. A reasonable inference is that Plaintiffs acquired their securities from the Underwriter Defendants.").

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

C. Lead Plaintiffs Allege Actionable Misrepresentations and Omissions

Section 11 liability exists when, as here, a registration statement "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). To state a claim under Section 11, a plaintiff must plead: (1) that the registration statement at issue contained an omission or misstatement; and (2) that the omission or misstatement was material, "that is, it would have misled a reasonable investor about the nature of his or her investment." *Kaplan v. Rose*, 49 F.3d 1363, 1371 (9th Cir.1994). A complaint sufficiently pleads falsity where, as here, it includes (1) each statement or omission alleged to have been misleading; (2) the reason or reasons why the statement or omission is misleading; and (3) all facts on which that belief is formed. *See Desaigoudar v. Meyercord*, 223 F.3d 1020, 1023 (9th Cir. 2000). The Ninth Circuit "recognize[s] that statements literally true on their face may nonetheless be misleading when considered in context." *Miller v. Thane Int'l, Inc.*, 519 F.3d 879, 886 (9th Cir. 2008).

> [A]n issuer's public statements cannot be analyzed in complete isolation. "Some statements, although literally accurate, can become, through their context and manner of presentation, devices which mislead investors. For that reason, the disclosure required by the securities laws is measured not by literal truth, but by the ability of the material to accurately inform rather than mislead prospective buyers."

Id. (quoting *In re Convergent Tech. Sec. Litig.*, 948 F.2d 507, 512 (9th Cir.1991)). Indeed, whether securities offering documents contain materially untrue statements is a mixed question of fact and law and is generally inappropriate for determination on a motion to dismiss. *See Warshaw v. Xoma Corp.*, 74 F.3d 955, 959 (9th Cir. 1996). A complaint may not be properly dismissed pursuant to Rule 12(b)(6) on the ground that the alleged misstatements or omissions are not material unless it is "so obvious that reasonable minds [could] not differ" as to the materiality of the misstatement. *Fecht v. Price Co.*, 70 F.3d 1078, 1081 (9th Cir. 1995) (quoting *Durning v. First Boston Corp.*, 815 F.2d 1265, 1268 (9th Cir. 1987)).

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

Lead Plaintiffs' Complaint adequately alleges that the Offering Documents contained misstatements of material facts and omitted to state material facts necessary to make the statements made, not misleading. Specifically, the Complaint alleges that the Offering Documents contained material misstatements and omissions regarding: (1) the underwriting standards purportedly used in connection with the origination of the underlying mortgages; (2) the due diligence conducted to ensure the originators' compliance with the loan underwriting guidelines stated in the Offering Documents; (3) the maximum loan-to-value ratios used to qualify borrowers; (4) the appraisals of the properties underlying the mortgages; and (5) the credit ratings of the Certificates. ¶16.

1. Lead Plaintiffs Have Adequately Alleged Misrepresentations and Omissions Regarding Underwriting Guidelines

The Complaint identifies specific false statements in the Offering Documents that described the underwriting standards used to originate the underlying mortgage loans. For example, both Registration Statements stated that:

> The mortgage loan seller's underwriting standards are intended to evaluate a prospective mortgagor's credit standing and repayment ability, and the value and adequacy of the proposed mortgage property as collateral. In the loan application process, prospective mortgagors generally will be required to provide information regarding such factors as their assets, liabilities, income, credit history, employment history and other related items. Each prospective mortgagor generally will also provide an authorization to apply for a credit report which summarizes the mortgagor's credit history. With respect to establishing the prospective mortgagor's ability to make timely payments, the mortgage loan seller may require evidence regarding the mortgagor's employment and income, and of the amount of deposits made to financial institution where the mortgagor maintains demand or savings accounts . . . .

¶138. Likewise, the Prospectus Supplements stated that:

> The sponsor's underwriting guidelines generally are intended to evaluate the prospective borrower's credit standing and repayment ability and the value and adequacy of the mortgaged property as collateral.

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

¶143. These statements were materially untrue because WMB and the third-party originators systematically disregarded their stated underwriting standards, issuing loans that were increasingly unlikely to be repaid, and making exceptions to the underwriting standards as a matter of course. WaMu did not investigate the underwriting standards and the validity of appraisal values on the underlying mortgaged properties prior to securitization. ¶¶139, 144. Specifically, only a small sampling of the mortgage loan pool, no more than 5%-7%, was reviewed before WaMu securitized the loans. *Id.* Moreover, WMAAC made no attempt to confirm the underwriting standards and appraisal standards employed by correspondent and third party lenders from which they acquired mortgages. *Id.* Far from evaluating "the applicant's credit standing and ability to repay the loan," WMB actually weakened its underwriting standards and increased its exceptions to those standards in order to increase loan volume. ¶¶9, 144, 149. In sum, the Complaint alleges sufficient facts to state a claim that the Offering Documents contained untrue statements and omissions regarding the underwriting standards and quality of the mortgages underlying the certificates that is "'plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Underwriting is fundamental to mortgage loans, and statements about loan standards and quality are material to investors whose securities are backed by those loans. *See In re PMI Group, Inc. Sec. Litig.*, No. 08 Civ. 1405, 2009 WL 3681669, at *4 (N.D. Cal. Nov. 2, 2009) (statements regarding the quality of company's underwriting practices and exposure to risk were false and misleading); *Atlas v. Accredited Home Lenders Holding* Co., 556 F.Supp. 2d 1142, 1155 (S.D. Cal. 2008) (denying lending company's motion to dismiss and noting that "underwriting practices would be among the most important information looked to by investors"); *In re Countrywide Fin. Corp. Derivative Litig.*, 554 F.Supp.2d 1044, 1057 (C.D. Cal. 2008) (false statements included representations that Countrywide actively managed

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

credit risk, applied more stringent underwriting standards for riskier loans such as ARMs, and only retained high credit quality mortgages in its loan portfolio).

WaMu Defendants contend that Lead Plaintiffs have failed to allege any misstatements or omissions because such alleged omissions, according to WaMu Defendants, were disclosed in the Offering Documents. *See* WaMu Mot. at 16-18. As an initial matter, WaMu Defendants must satisfy a high burden to demonstrate that the misstatements and omissions are immaterial as a matter of law. *See Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 947 (9th Cir. 2005); *In re Metro. Sec. Litig.*, 532 F Supp. 2d 1260, 1291 (E.D. Wash. 2007) ("there is 'sufficient' cautionary language or risk disclosure [such] that reasonable minds could not disagree that the challenged statements were not misleading"). Indeed, "defendants bear a heavy burden of proof" before they can succeed on this defense. *Cf. Provenz v. Miller*, 102 F.3d 1478, 1493 (9th Cir. 1996) (defining a "truth-on-the-market" defense and refusing to rule as a matter of law that investors were not misled by defendants' statements).

WaMu Defendants' contention that the Offering Documents adequately disclosed the true risk of the Certificates is both wrong and too fact-intensive for resolution on the pleadings. WaMu Defendants claim that the Offering Documents revealed the rampant violations of underwriting standards by stating, for example, that "[e]xceptions to the sponsor's loan program parameters may be made on a case-by-case basis if compensating factors are present." WaMu Mot. at 16. This statement does not disclose, however, that WMB repeatedly made exceptions to its underwriting standards in order to increase loan volume. ¶149. In other words, Lead Plaintiffs here allege that the Offering Documents were misleading as to the extent to which WMB and their correspondent third-party originators deviated from their origination guidelines, and thus have pled an "actionable category of misstatements." *In re Wells Fargo Mortgage-Backed Certificates Litig.*, No. 09 Civ. 01376, 2010 WL 1661534, at *11 (N.D. Cal. Apr. 22, 2010); *see also In re Lehman Bros. Sec. & Litig.*, No. 08 Civ. 6762, 2010 WL 545992, at *5 (S.D.N.Y. Feb. 17, 2010).

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

WaMu Defendants also argue that there can be no actionable omissions regarding underwriting standards because "specific characteristics of the loans were disclosed in the tables describing each loan pool" in the Offering Documents. WaMu Mot. at 17-18. In truth, however, the information included in the Offering Documents utterly fails to disclose the borrowers' creditworthiness or the true risks of the loans. The mere fact that the Offering Documents included tabular data provides no information to investors about violations of underwriting standards. For example, disclosing the averages and breakdowns of the FICO scores and principal amounts says nothing about the failure to properly value the collateral or the creditworthiness of borrowers. As such, the data does not, and cannot, cure the material omissions alleged in the Complaint. "[A] violation of Section 11 will be found when material facts have been omitted or presented in such a way as to 'obscure[] or distort[]' their significance." I. *Meyer Pincus & Assocs., P.C. v. Oppenheimer & Co., Inc.*, 936 F.2d 759, 761 (2d Cir. 1991). *See also In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 618 F.Supp. 2d 311, 320 (S.D.N.Y. 2009).

WaMu Defendants rely heavily on the recent decision in *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 658 F.Supp.2d 299 (D. Mass. 2009). *Nomura* is an out-of-circuit opinion, which is currently on appeal. The court in *Nomura* did not hold that plaintiffs failed to plead falsity. Rather, the court held that the extensive risk disclosures present there sufficiently warned of the potential perils of subprime mortgage loans (*i.e.*, that the loans in the mortgage pools may not conform to Fannie Mae and Freddie Mac, and therefore may experience rates of delinquency, foreclosure and borrower bankruptcy that are higher, and that may be significantly higher, than those experienced by mortgage loans underwritten in strict compliance with Fannie Mae or Freddie Mac). *Nomura*, 658 F.Supp.2d at 306. Here, in stark contrast to *Nomura*, the purported disclosures are far more general. Therefore, the deviations from underwriting standards, which are detailed in the Complaint, dramatically affected the total mix of information available to investors. ¶¶52-90. In short,

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

the disclosures here fail to protect WaMu Defendants as they did in *Nomura* because they "create[d] an impression of a state of affairs that differ[ed] in a material way from the one that actually exist[ed]." *PMI Group*, 2009 WL 1916934, at *7 (citing *Brody v. Transitional Hosp.* Corp., 280 F.3d 997, 1005-06 (9th Cir. 2002)).

Moreover, "whether adverse facts are adequately disclosed is a mixed question to be decided by the trier of fact." *Fecht v. Price Co.*, 70 F.3d 1078, 1081 (9th Cir. 1995). "The adequacy of a disclosure should be resolved at the motion to dismiss stage, therefore, only when the adequacy is so obvious that reasonable minds [could] not differ." *Id*. "It would be premature for this court to evaluate the actual materiality of defendants' omissions, because the materiality of an omission is a question reserved for a jury unless 'reasonable minds could not differ' on the adequacy of the disclosure and the question is appropriate for resolution as a matter of law." *In re CornerStone Propane Partners, L.P.*, 355 F.Supp. 2d 1069, 1086 (N.D. Cal. 2005) (quoting *In re Stac Elec. Sec. Litig*., 89 F.3d 1399, 1405 (9th Cir.1996)); *see also Lehman Bros. Sec. Litig.*, 2010 WL 545992, at *5.

In essence, WaMu Defendants contend that the Complaint must allege information specific to each mortgage loan underlying each Certificate, including that deviations from WMB's stated underwriting standards and failure to conduct due diligence occurred in specific, individual loans at issue in this action. WaMU Mot. at 19-20. WaMu Defendants ignore the extraordinary ratings collapse from triple-A to junk bond grade. ¶13. WaMu Defendants' demand for further detail improperly seeks to require Lead Plaintiffs ***to prove*** their claims at this stage of the litigation. *See Tooley v. Napolitano*, 556 F.3d 836, 839 (D.C. Cir. 2009) ("*Twombly* leaves the longstanding fundamentals of notice pleading intact.").

2. Lead Plaintiffs Have Adequately Alleged Misrepresentations and Omissions Regarding Loan-to-Value Ratios

The fundamental basis upon which the Certificates are valued is the ability of borrowers to repay the loans and the adequacy of the collateral for those loans in case of

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

default. ¶58. Accordingly, accurate appraisals of the collateralized real estate, and the calculated LTV ratios and averages based on those appraisals, were essential to assessment of the price and risk of the Certificates. *Id*. Here, WaMu Defendants misrepresented the value of the underlying real estate securing the loans pooled in the respective Issuing Trusts, in terms of LTV averages and the appraisal standards by which such real estate values were measured; and, as a result, the LTV ratios in the Offering Documents were artificially low, making it appear that the loans underlying the trust, and thus the Certificates, were safer than they were. ¶¶62-84.

The Complaint details that appraisers "experience[d] systemic problems of coercion" whereby they were forced to raise property valuations or suffer "negative ramifications" and other repercussions. *Id*. These allegations are supported by documentary evidence obtained in the course of the New York Attorney General's investigation of WaMu and its appraisers in *People of the State of New York v. First American Corporation and First American eAppraiseIT*, No. 07-406796 (N.Y.Sup.Ct. Nov. 1, 2007). ¶¶68-83. These allegations sufficiently allege misstatements regarding loan appraisals and loan-to-value ratios.

The Offering Documents included comprehensive and detailed data on LTV ratios, which - if accurate – would enable investors to properly assess the extent of the afforded protections against such known risks. Here, the LTV ratios in the Offering Documents would have been higher if the underlying properties were appraised according to the originators' pre-established, independent appraisal procedures, in accordance with the Uniform Standards of Professional Appraisal Practice ("USPAP"), as stated in the Registration Statements and Prospectus Supplements. ¶¶60, 61, 146. As a result of over-inflated appraisals, WaMu Defendants misrepresented the risk of the Certificates. Lead Plaintiffs have alleged that

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

WaMu Defendants' practices permitted the pervasive and systematic use of inflated appraisals, affecting all types of mortgages. Lead Plaintiffs need not allege anything further in order to state a claim. *Wells Fargo Mortgage-Backed Certificates*, 2010 WL 1661534, at *12.

As discussed above, the fact that the housing downturn occurred is not a defense to liability for these misrepresentations, and is not appropriately considered for other purposes at this stage of the litigation. *See, e.g., Countrywide*, 588 F.Supp. 2d at 1173-74; *In re New Century*, 588 F.Supp. 2d 1206, 1230 (C.D. Cal. 2008) (rejecting claim that mortgage lender and securitizer was "taken by surprise when the [housing] market took an unexpected turn for the worse"); *In re Moody's Corp. Sec. Litig.*, 599 F.Supp. 2d 493 (S.D.N.Y. 2009) (rejecting defendants' argument that the decline in stock price was due to intervening cause of market collapse as result of subprime mortgage crisis).

3. Lead Plaintiffs Have Adequately Alleged Misrepresentations and Omissions Regarding Credit Ratings

The credit ratings in the Offering Documents constitute affirmative representations of the purported character and investment risk of the Certificates at the time of issuance. The Certificates' ratings, however, were based on outdated models. ¶¶15-16, Updated models were developed but not implemented. ¶¶105-113. In fact, a former S&P executive in the Ratings Services group confirmed that S&P made a conscious decision between at least 2001 and 2008 to use an outdated version of its LEVELs model for rating MBS. ¶110. The decision was motivated by S&P's desire to continue to assign triple-A ratings with minimal credit enhancement in order to preserve its market share. *Id.* Accordingly, the credit ratings reported by WMAAC in the Offering Documents affirmatively misrepresented the Certificates' risk profile, which, in truth, were "far riskier than represented," and were not equivalent to other investments with the same credit rating. ¶171. In similar context, credit ratings have been held to be actionable misstatements. *See Abu Dhabi Commercial Bank v.*

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

Morgan Stanley & Co., Inc., 651 F.Supp.2d 155 (S.D.N.Y. 2009) (finding high ratings and the information they conveyed to be actionable misstatements).

In addition, the Offering Documents omitted facts necessary to make statements regarding the ratings not misleading. For example, WaMu Defendants failed to disclose that the Rating Agencies' compensation created conflicts of interest that were exacerbated when the Rating Agencies rated structured products such as the Certificates. ¶¶16, 91-97. Likewise, WaMu Defendants did not disclose that the Rating Agencies' fees were based on the issuance of the ratings sought by WaMu, rather than an objective and independent analysis. Accordingly, investors were unaware of the Rating Agencies' significant conflicts of interest, and that those conflicts could interfere with purportedly independent ratings. The fact that investors were unaware of these facts defeats WaMu Defendants' claim that the issuer-pay compensation model was "publicly known." WaMu Mot. at 36. The degree to which the MBS compensation model "exacerbated" the conflicts of interest inherent in the issuer-pay model was unknown until the SEC published the Summary Report in July 2008.

In sum, the misstatements and omissions related to the Certificates' ratings are well-pled, and are not so obviously unimportant to a reasonable investor that reasonable investors "cannot not differ on the question of their materiality." *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976). Lead Plaintiffs' allegations with respect to the rating process are sufficient to establish an actionable misstatement. *See Wells Fargo Mortgage-Backed Certificates*, 2010 WL 1661534, at *12.[6]

D. WaMu Defendants Are Not Shielded from Securities Act Liability by the Purchase and Sale Agreements

Effectively admitting that the Class has suffered damages, WaMu Defendants contend that they should be relieved of liability because the Offering Documents purportedly describe a

[6] WaMu Defendants alternatively argue that SEC Rule 436(g) immunizes them from liability, however Rule 436(g) does not provide broad insulation to all parties against all causes of action. Section (g)(1) is expressly limited to "sections 7 and 11 of the Act." 17 C.F.R. § 230.436 (g)(1).

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

process by which bad loans could be "cured" or replaced at the request of the investor. *See* WaMu Mot. at 32-33. Defendants' assertion has no relevance here, as liability exists under Sections 11 and 12(a)(2) for a misstatement in the Offering Documents irrespective of any other remedial relief. *See* 15 U.S.C. § 77k. These provisions may not be waived, and language to the contrary in any offering document is void *ab initio*. 15 U.S.C. § 77n ("Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title . . . or of the rules and regulations of the Commission shall be void.").[7] Significantly, "[t]he statutory framework of the 1933 and 1934 Acts compels the conclusion that individual securityholders may not be forced to forego their rights under the federal securities laws due to a contract provision." *McMahan & Co. v. Wherehouse Entm't, Inc.*, 65 F.3d 1044, 1050-51 (2d Cir. 1995) (holding that claims under the federal securities laws may not be precluded by a "no-action clause" in an indenture).

WaMu Defendants rely on one decision from the Northern District of Texas, *Lone Star Fund V(U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 389 (5th Cir. 2010). However, the court's opinion in *Lone Star* turned on a single issue which has no application to the instant case. Specifically, in *Lone Star* the court determined that:

> ***All*** of Appellants' various claims are predicated upon Barclays' alleged misrepresentation that there were *no* delinquent loans in the BR2 and BR3 Trusts when Lone Star purchased the securities. Consequently, to prevail, Appellants must successfully allege [] that Barclays represented that the BR2 and BR3 Trusts had no delinquent mortgages . . . .

Id. at 388 (emphasis added).

As a result, when the *Lone Star* court found that "Barclays did not represent that the BR2 and BR3 mortgage pools were absolutely free from delinquent loans at the time of

[7] Because of the express terms of § 14 of the Securities Act, "courts have been careful in securities cases to preserve the rights of private action under the securities laws." *Stratmore v. Combs*, 723 F.Supp. 458, 461 (N.D. Cal. 1989) (***"Since the securities laws are a remedial measure intended to encourage the prosecution of securities fraud actions, the Court refuses to enforce this indemnity provision."***), *aff'd*, *McGonigle v. Combs*, 968 F.2d 810 (9th Cir. 1992).

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

purchase," it dismissed plaintiffs' claims in that case. This has *no* application to the instant case because the Complaint here ***does not even include***, much less rely on, the misstatement at issue in *Lone Star*. In this case, Lead Plaintiffs allege multiple separate and distinct actionable misstatements and omissions in the Registration Statements and Prospectuses as detailed in the Complaint – ***none*** of which mirror the single allegation in the *Lone Star* case. The misstatements and omissions at issue here include alleged non-compliance with stated underwriting guidelines and appraisal standards, understated loan-to-value ratios and understated credit enhancement. Needless to say, the Fifth Circuit decision in *Lone Star* does not address ***any*** of these alleged misstatements and omissions.

Furthermore, although the Complaint here does make allegations regarding misstatements and omissions in the Complaint regarding delinquencies, Lead Plaintiffs' challenge to the delinquency representations contained in the Registration Statements and Prospectuses here is fundamentally different from the alleged misrepresentation in *Lone Star*. The Complaint here does not claim that the Registration Statements and Prospectuses promised that there would be ***no*** delinquent loans. Instead, the Complaint alleges as follows:

> Each of the Prospectus Supplements contained the language set forth above or some variation of it, indicating, as of the "cut-off date" (defined differently in each Prospectus Supplement), the percentage of mortgage loan collateral that was 30-59 and 60 days delinquent….
>
> [Charts Omitted]
>
> ***Omitted Information:*** *These statements masked the true impaired nature of the collateral since the delinquency rates for these loan pools followed the same pattern of skyrocketing delinquencies immediately following the Offering dates. Specifically, within four months after the respective "cut-off dates, delinquencies and defaults increased by an average of 1,020%, from 0.76% to over 8% of the outstanding pool balances, and within six months that figure further rose to over 12% of the balances. As of the date of the filing of this Complaint, borrower delinquency and defaults have increased to over 51% of the outstanding collateral balance.*

¶¶179-81.

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

As Judge Kaplan recently put it when he upheld similar allegations to those in this Complaint in *In re Lehman Bros.*, "Plaintiffs allege that the delinquency and foreclosure rates of loans in the pools underlying the Certificates increased after the Certificates were issued." 2010 WL 545992, at *4. Further, defendants in similar MBS cases in the Southern District of New York have already attempted to rely on *Lone Star* to support their argument to no avail. In fact, courts have rejected the *Lone Star* case's applicability without so much as even a footnote discussion.

E. Lead Plaintiffs Sufficiently Allege a Cognizable Economic Loss

WaMu Defendants argue that the only legally cognizable injury that Lead Plaintiffs can assert is that they failed to receive a timely principal or interest payment pursuant to the Certificates. WaMu Defendants are wrong. The Complaint alleges that Lead Plaintiffs and the Class have suffered damages as a result of WaMu Defendants' Section 11 and 12(a)(2) violations. The value of the Certificates purchased by Lead Plaintiffs and the Class has dramatically plummeted since the Offerings. At this stage, the Complaint need not allege more.

Section 11 of the Securities Act states that a plaintiff who purchases a security may "recover such damages as shall represent the difference between the amount paid for the security . . . and . . . the value thereof as of the time such suit was brought." 15 U.S.C. § 77k(e). The type of injury that the statute contemplates is "a decline in investment value due to materially false or misleading information in the registration statement." *Countrywide,* 588 F.Supp.2d at 1168. A plaintiff pleading a Section 11 claim is required to allege (1) the purchase of relevant securities and (2) facts creating the reasonable inference that the value of the securities at the presumptive damages date is *less* than the purchase price. *Id.* at 1169-70. Section 12(a)(2) requires an allegation of "[s]ome cognizable loss." *Id.* at 1183. So long as the other allegations in the complaint (and other matters of which the Court may take judicial notice) do not conclusively demonstrate that plaintiffs cannot prove a loss, the complaint will

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

survive a motion to dismiss. *Id.* at 1169-70. It cannot be disputed that Lead Plaintiffs have alleged a diminution in value of the securities they purchased. No loss causation issues are raised on the face of the Complaint; nor do WaMu Defendants suggest that Lead Plaintiffs cannot, as a matter of law, prove that the alleged diminution in value of the securities is related to the alleged material misstatements and omissions. At this stage, nothing more is required. *Countrywide*, 588 F.Supp.2d at 1169-70.

WaMu Defendants assert that in order to state a claim upon which relief may be granted and survive a motion to dismiss, Plaintiffs must allege that they "have not received the payments due from their Certificates." WaMu Mot. at 35. However, nothing in the statue or in the applicable case law supports WaMu Defendants' assertion, and it is simply wrong on its face. *Countrywide*, 588 F.Supp. 2d at 1168-70. Furthermore, although "Section 11(e) sets the measure of damages for a plaintiff still holding her securities at the 'value' of those securities at the time of suit . . . the determination of value is a fact-intensive inquiry" that is "inappropriate to resolve at the motion to dismiss stage." *In re Initial Pub. Offering Sec. Litig.*, 341 F.Supp.2d 328, 351 n.80 (S.D.N.Y. June 8, 2004). WaMu Defendants will have the opportunity to offer evidence in support of their argument that the type of economic injury Plaintiffs allege is somehow not recoverable and to contest the appropriate measure of such damages. But, at this stage, with all inferences properly made in Plaintiffs' favor, the Complaint's damages allegations are more than sufficient to withstand a motion to dismiss.

In fact, district courts have already rejected this exact argument in the context of mortgage-backed securities. In *New Jersey Carpenters Health Fund v. DLJ Mortg. Capital, Inc.*, No. 08 Civ. 5653, 2010 WL 1473288 (S.D.N.Y. Mar. 29, 2010), Judge Crotty of the Southern District of New York held that this economic loss theory represented far "too cramped a reading of damages." Judge Crotty explained:

> Since Plaintiff does not allege that it failed to receive any principal or interest payments due under its Certificates, Defendants argue that Plaintiff failed to allege a cognizable injury. The alleged injury – 79% diminution of market

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

> value – is said to be immaterial in the context of mortgage-backed securities Certificates. Plaintiff might suffer a loss from the impairment of cash flow, but loss of value is not a cognizable loss. ***This is too cramped a reading of damages.***
>
> Many fixed-income debt securities, such as corporate bonds, do not trade on national exchanges and yet institutional investors routinely purchase corporate bonds hoping to realize a profit through resale. Plaintiff may have purchased the Certificates expecting to resell them, making market value the critical valuation marker for Plaintiff. This is a securities claim, not a breach of contract case. Mortgage-backed Certificates are a type of security, which is why, in fact, the SEC has adopted a regulatory scheme relating to pooled asset-backed securities: 17 C.F.R. § 229.1111. At this stage all that may be said is Plaintiff's market value allegations are sufficient.

2010 WL 1473288, at *5. Clearly, Lead Plaintiffs' allegations of economic loss are sufficient.

F. Generalized Risk Disclosures Are Not Grounds for Dismissal

WaMu Defendants also argue that Lead Plaintiffs have failed to allege any misstatements or omissions because the Offering Documents contained sufficient "cautionary language" to render the misstatements and omissions immaterial as a matter of law. WaMu Mot. at 36-38. WaMu Defendants must satisfy a high burden to demonstrate that the misstatements and omissions are immaterial as a matter of law. *See, e.g., Livid Holdings Ltd. V. Salomon Smith Barney, Inc.*, 416 F.3d 940, 947 (9th Cir. 2005) ("Dismissal on the pleadings under the bespeaks caution doctrine, however, requires a stringent showing: There must be sufficient 'cautionary language or risk disclosure [such] that reasonable minds could not disagree that the challenged statements were not misleading.'") (quotation omitted); *In re Metro. Sec. Litig.*, 532 F.Supp.2d 1260, 1291 (E.D. Wash. 2007) (same); *Provenz*, 102 F.3d at 1493 (holding that "defendants bear a heavy burden of proof" on a "bespeaks caution" defense and refusing to rule as a matter of law that investors were not misled by defendants' statements).

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

Here, WaMu Defendants' contention that the Offering Documents adequately disclosed the true risk of the Certificates is both wrong and too fact-intensive for resolution on the pleadings. Importantly, none of the "risk disclosures" informed investors that WaMu Defendants were systematically disregarding their own loan origination standards. ¶15. Nor did the risk disclosures inform investors that WaMu Defendants were using inflated and inaccurate appraisals to secure the underlying mortgage loans. The risk disclosures also did not disclose that:

- WaMu Defendants engaged the Rating Agencies by way of "ratings shopping" – the practice of having the Rating Agencies provide proposed ratings on the Certificates as part of their bid for Certificate engagements. ¶10;

- WaMu Defendants relied wholly on inadequate reviews of the underlying mortgages conducted by third-party firms, who were engaged by WCC to examine small samples – 5%-7% at most – of the mortgage loans in WMB's loan portfolio. ¶16;

- The Rating Agencies' models for assigning rates to the Certificates were woefully outdated, employing obsolete statistical assumptions based on the performance of mortgage loans and underwriting standards for mortgages loans issued prior to 2003. ¶17;

- The material financial conflicts of interest between the Rating Agencies and WaMu, including WaMu's engagement of the Rating Agencies through ratings shopping. ¶18; and

- That mortgage loans underlying the Certificates were not originated in accordance with the loan underwriting guidelines stated in the Offering Documents; that the appraisals on many of the properties collateralizing the mortgages underlying the Certificates were inflated; that the amount of credit enhancement provided to the Certificates was inadequate to support AAA and investment grated ratings. ¶20.

In addition, WaMu Defendants' "cautionary language" is too fact-intensive for resolution on a motion to dismiss. Indeed, "whether adverse facts are adequately disclosed is a mixed question to be decided by the trier of fact." *Fecht*, 70 F.3d at 1081. Indeed, numerous courts have held that the adequacy of such disclosures should be decided on a motion to dismiss only when the adequacy is so obvious that "reasonable minds [could] not differ." *Id.*;

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

see also Gray v. First Winthrop Corp., 82 F.3d 877, 883 (9th Cir. 1996) (same); *In re Thoratec Corp. Sec. Litig.*, No. 04-03168, 2006 WL 1305226, at *10 (N.D. Cal. May 11, 2006) ("courts generally may not dismiss a complaint on the basis of a truth-on-the-market defense to a fraud-on-the market theory"). Thus, "[i]t would be premature for this court to evaluate the actual materiality of defendants' omissions, because the materiality of an omission is a question reserved for a jury unless 'reasonable minds could not differ' on the adequacy of the disclosure and the question is appropriate for resolution as a matter of law." *CornerStone Propane Partners*, 355 F.Supp.2d at 1086.

G. Lead Plaintiffs Adequately Allege that WCC and the Individual Defendants Were "Control Persons" for Purposes of Section 15 Liability

The Complaint pleads a claim for control person liability under § 15 of the Securities Act by alleging both a primary violation of the Securities Act and that WCC and the Individual Defendants controlled the primary violators. *See* 15 U.S.C. § 77o. To plead control, a plaintiff need only allege that the defendant possessed the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1065 n.9 (9th Cir. 2000); *see also Daou Systems, Inc.*, 411 F.3d at 1029-30. Control allegations are governed by Rule 8(a), and whether or not a particular defendant had power to control the primary violator is an intensely factual question that typically is not appropriate to decide on a motion to dismiss. *See, e.g., Howard v. Everex Sys.*, 228 F.3d 1057, 1065 (9th Cir. 2000) ("Whether [the defendant] is a controlling person is an intensely factual question, involving scrutiny of the defendant's participation in the day-to-day affairs of the corporation and the defendant's power to control corporate actions.").

Here, there can be no question that WMAAC was controlled within the meaning of Section 15 by WCC. WCC created and controlled WMAAC for the sole purpose of issuing the Certificates. ¶¶55-60. WCC served as the lead underwriter for all of the securities that were issued by WMAAC. ¶¶82-84. As for the Individual Defendants, they were all either

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

directors and/or officers at the time of an Offering, and signed one or more of the false and misleading Registration Statements. This alleges more than mere status since these defendants had the power to control and approve the disclosures made in the Offerings. *See, e.g., In re LDK Solar Sec. Litig.*, No. 07 Civ. 05182 2008 WL 4369987, at *2 (N.D. Cal. Sept. 24, 2008) (holding that signing or authorizing the signing of the registration statements at issue in the suit are "activities typical of managers with the ability to control or influence a corporation").

H. Plaintiffs' Claims Are Not Time-Barred

WaMu Defendants assert that all of Doral Bank's claims are time-barred under § 13 of the Securities Act because, according to WaMu Defendants, Doral Bank was on inquiry notice of the causes of action asserted in the Complaint before October 30, 2008 – more than one year prior to Doral Bank's filing of the first complaint in this action. WaMu Defendants also assert that the appraisal-related claims are time-barred for most Certificates because Plaintiffs were supposedly on inquiry notice of the appraisal claims more than one year prior to the date when the Lead Plaintiffs filed their first complaints. WaMu Defendants are wrong on both counts.

1. The Standard for Inquiry Notice

Section 13 of the Securities Act provides, in part, that "[n]o action shall be maintained to enforce any liability created under [Section 11] of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence." 15 U.S.C. § 77m. The U.S. Supreme Court recently explained what is required to put a plaintiff on inquiry notice in *Merck & Co., Inc. v. Reynolds*, -- S. Ct. --, 2010 WL 1655827 (April 27, 2010). There, the Supreme Court, when dealing with a similar statute contained in the Securities Exchange Act of 1934, held that:

> ***We conclude that the limitations period … begins to run once the plaintiff did discover or a reasonably diligent plaintiff would have "discover[ed] the facts constituting the violation" – whichever comes first.*** In determining the time at which the "discovery" of those "facts" occurred, terms such as "inquiry notice" and "storm warning" may be useful to the extent that they identify a time when

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

> the facts would behave prompted a reasonable diligent plaintiff to begin investigating. ***But the limitations period does not begin to run until the plaintiff thereafter discovers or a reasonably diligent plaintiff would have discovered "the facts constituting the violation,"***….

Id. at *15 (emphasis added).

The Ninth Circuit has further held that defendants bear a "considerable burden" in demonstrating that a plaintiff's claim is time-barred, the question of whether a plaintiff is on inquiry notice for purposes of the statute of limitations is typically one for the trier of fact. *Betz v. Trainer Wortham & Co., Inc.*, 519 F.3d 863, 876-77 (9th Cir. 2008); *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1309-10 (9th Cir. 1982) (same); *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 879 (9th Cir. 1984). "The facts constituting inquiry 'notice must be sufficiently probative of [a claim] – sufficiently advanced beyond the stage of mere suspicion … to incite the victim to investigate." *Betz*, 519 F.3d at 876. Federal courts have repeatedly held that the question of when the statute of limitations begins to run on federal securities law claims in inherently fact-specific. *See Dorchester Investors v. Peak Int'l Ltd.*, 134 F.Supp.2d 569, 577 (S.D.N.Y. 2001) (finding that "the issue of whether Plaintiffs were on inquiry notice, and thus whether their claims are barred by the statue of limitations, is a factual one to be resolved by the trier of fact").

2. WaMu Defendants Have Not Shown that Doral Bank Was on Inquiry Notice Prior to October 30, 2008

WaMu Defendants claim that Doral Bank's claims are barred on statute of limitations grounds because they were supposedly on inquiry notice prior to October 30, 2008 – which is more than one year prior to the date when Doral Bank filed its initial complaint in this action. In making this argument, WaMu Defendants point to both the August 1, 2008 complaint that was filed by other investors who held Certificates that Doral Bank did not own (the "New Orleans Complaint"), and the August 20, 2008 complaint that was filed by investors who held Washington Mutual common stock (the "Federal Securities Complaint"). WaMu Defendants make this argument even though the New Orleans and Federal Securities cases involved

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

different securities, different underlying mortgages from different years, and different defendants.

Tellingly, WaMu Defendants point to nothing ***specific*** in the New Orleans complaint that could have put Doral on inquiry notice that it had securities law claims based on the specific Certificates it owned. This is not surprising because the allegations concerning the misstatements made in the New Orleans case, and the downgrades that affected those securities are different and therefore distinguishable from the Certificates and misstatements at issue in the Doral complaint. For this reason alone, they cannot be said to have put a reasonable investor on notice that the existence of the claims alleged in the Doral complaint. *Newman v. Warnaco Group, Inc.*, 335 F.3d 92, 193 (2d Cir. 2004) (holding that, under the "objective standard for inquiry notice, the information provided must trigger notice with sufficient storm warning to alert a reasonable person to the probability that there were either misleading statements or significant omissions involved"); *Levitt v. Bear Stearns & Co.*, 340 F.3d 94 (2d Cir. 2003) ("[W]hen the circumstances would suggest to an investor of ordinary intelligence the probability that she has been defrauded, a duty of inquiry arises.").

Moreover, defendants must present ***uncontroverted*** evidence showing that a plaintiff knew or should have know about its securities law claim in order to establish that the plaintiff was on inquiry notice as a matter of law. *See In re Initial Publ. Offering Sec. Litig.*, 341 F.Supp.2d 328, 347 (S.D.N.Y. 2004); *see also Newman*, 335 F.3d at 193-95. Where defendants offer reasonable words of comfort, or repeat the misstatements that form the basis for the securities law violation in the first instance, the storm warning become "controverted" and inquiry notice is defeated. *In re Moody's Corp. Sec. Litig.*, 599 F.Supp.2d 493, 506 (S.D.N.Y. 2009) (plaintiffs are not put on inquiry notice when they "reasonably rely" on "reliable words of comfort from management'); *Lapin v. Goldman Sachs Group, Inc.*, 506 F.Supp.2d 221, 234 (S.D.N.Y. 2006) ("A plaintiff may not be considered to have been placed on inquiry notice, 'despite the presence of some ominous indicators,' when 'the warning signs

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

are accompanied by reliable words of comfort from management.'"). Here, WaMu Defendants continued to file materially misleading Prospectus Supplements throughout the Class Period that continued to reassure investors and negated any claim WaMu Defendants may have that Doral Bank could have been on inquiry notice of its securities law claims. Accordingly, there is no merit to WaMu Defendants' argument that Doral Bank's claims are time-barred on statute of limitations grounds.

3. The Appraisal-Related Claims Are Not Time-Barred

WaMu Defendants go on to argue that most of the appraisal claims asserted in the Complaint are time barred on statute of limitations grounds. In making this argument, WaMu Defendants point to the Complaint that the New York Attorney General filed against First American and eAppraiseIT on November 1, 2007, and argue that the allegations contained in this Complaint put Plaintiffs on notice of the appraisal-related claims at issue in this suit. This argument fails for the same reason that WaMu Defendants' Doral Bank statute of limitations argument fails: WaMu Defendants have failed to provide any specifics from the New York Attorney General complaint that would have put a reasonable investor on notice that the Defendants in the present suit were using inflated appraisals when issuing the specific mortgages underlying the specific Certificates at issue in this case. Without any such specifics, WaMu Defendants cannot satisfy their heavy burden of showing that Plaintiffs were on inquiry notice of the appraisal-related claims as a matter of law. *Betz*, 519 F.3d at 876-77; *SEC v. Seaboard Corp.*, 677 F.2d at 1309-10.

WaMu Defendants' argument also fails because Plaintiffs filed a Complaint on behalf of all investors who purchased Certificates pursuant to the same registration statement that is at issue in this lawsuit on August 1, 2008, which was within the one-year notice inquiry period set forth in the Securities Act. Thus, the statute of limitations was tolled with respect to any later-filed claims. *See, e.g, American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974) ("[T]he commencement of a class action suspends the applicable statute of limitations as to all

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

asserted class members of the class who would have been parties had the suit been permitted to continue as a class action."). Under the tolling doctrine, the filing of a class action tolls any applicable statute of limitations or statute of repose for all putative members of the potential class when an action is pending, up to the point that the court denies class certification. *Flag Telecom*, 352 F.Supp.2d at 455; *see also Korwek v. Hunt*, 827 F.2d 874, 876-77 (2d Cir. 1987).

Moreover, whether or not the specific named plaintiff has standing to assert claims on behalf of members of the entire class is irrelevant when it comes to the application of the *American Pipe* tolling doctrine. As the court in *Flag Telecom* explained: "[T]he failure to apply the *American Pipe* rule to cases where a class action was dismissed for lack of standing undermines the policies underlying Rule 23 and is inconsistent with the Court's reasoning in *American Pipe.*"; *see also In re Enron Corp. Sec. Derivative & ERISA Litig.*, 529 F.Supp.2d 644, 709 (S.D. Tex. 2006) (rejecting argument that doctrine of relation back cannot save Securities act claims of a newly added plaintiff by acknowledging that class actions are tolled under *American Pipe*); *California Publ. Employees' Ret. Sys. v. Chubb Corp.*, No. 00-4285, 2002 WL 33934282, at *27 (D.N.J. June 26, 2002) (finding that limitations period was tolled upon filing of original class action complaint which allowed proper class representatives to be substitute for standing purposes to assert additional claims in amended complaint). Tolling is therefore available and it protects all of Plaintiffs' appraisal-related Securities Act claims asserted in the August 1, 2008 New Orleans complaint.

III. CONCLUSION

The vast majority of the federal district courts have now rejected dismissal of Securities Act claims (based on less egregious facts) brought on behalf of mortgage pass-through certificate purchasers alleging that the issuer and investment banking underwriter systematically disregarded the loan origination guidelines contained in the offering documents. *See, e.g., In re Wells Fargo Mortgage-Backed Certificates Litig.*, No. 09 Civ. 01376, 2010 WL 1661534 (N.D. Cal. April 22, 2010); *New Jersey Carpenters Health Fund v. Residential*

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

Capital, LLC, No. 08 Civ. 8781, 2010 WL 1257528 (S.D.N.Y. March 31, 2010); *New Jersey Carpenters Vacation Fund v. Royal Bank of Scotland Group, PLC.*, No. 08 Civ. 5093, 2010 WL 1172694 (S.D.N.Y. March 26, 2010); *In re Lehman Bros. Sec. Litig.*, No. 08 Civ. 6762, 2010 WL 545992 (S.D.N.Y. Feb. 17, 2010).

For the above reasons, Lead Plaintiffs respectfully request the Court deny WaMu Defendants' motion to dismiss in its entirety. If, however, the Court dismisses all or part of the Complaint, Lead Plaintiffs respectfully request leave to amend. Federal Rule of Civil Procedure 15(a).

DATED: May 18, 2010

Respectfully submitted,

TOUSLEY BRAIN STEPHENS PLLC
By: /s/ Nancy A. Pacharzina
Nancy A. Pacharzina, WSBA #25946
Kim D. Stephens, WSBA #11984
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
Telephone: (206) 682-5600
Facsimile: (206) 682-2992
kstephens@tousley.com

Liaison Counsel for the Class

SCOTT+SCOTT LLP
Arthur L. Shingler III (admitted pro hac vice)
Hal D. Cunningham (admitted pro hac vice)
600 B Street, Suite 1500
San Diego, California 92101
Telephone: (619) 233-4565
Facsimile: (619) 233-0508
ashingler@scott-scott.com
hcunningham@scott-scott.com

Joseph P. Guglielmo (admitted pro hac vice)
500 Fifth Avenue, 40th Floor
New York, New York 10110
Telephone: (212) 223-6444
Facsimile: (212) 223-6334
jguglielmo@scott-scott.com

Counsel for Lead Plaintiff and the Class

COHEN MILSTEIN SELLERS & TOLL PLLC
Joel P. Laitman (admitted pro hac vice)
Christopher Lometti (admitted pro hac vice)
Daniel B. Rehns (admitted pro hac vice)
Kenneth M. Rehns (admitted pro hac vice)
150 East 52nd Street, Thirtieth Floor
New York, New York 10022
Telephone: (212) 838-7797
Facsimile: (212) 838-7745
jlaitman@cohenmilstein.com
clometti@cohenmilstain.com
drehns@cohenmilstein.com
krehns@cohenmilstein.com

Steven J. Toll
1100 New York Avenue, NW, Suite 500 West
Washington, D.C. 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699
stoll@cohenmilstein.com

Additional Plaintiffs' Counsel

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send electronic notification of such filing to all counsel of record and additional persons listed below.

Adam Zurofsky azurofsky@cahill.com

Andrew B Brettler abrettler@stblaw.com

Arthur L Shingler ashingler@scott-scott.com, efile@scott-scott.com

Barry Robert Ostrager bostrager@stblaw.com, managingclerk@stblaw.com

Bradley T. Meissner bradley.meissner@dlapiper.com

Brian C Free bcf@hcmp.com, gcp@hcmp.com

Bruce Earl Larson blarson@karrtuttle.com, psteinfeld@karrtuttle.com

Christopher E Lometti clometti@cohenmilstein.com

Christopher M Huck Christopher.huck@dlapiper.com, karen.hansen@dlapiper.com

Corey E Delaney corey.delaney@dlapiper.com, kerry.cunningham@dlapiper.com, patrick.smith@dlapiper.com, richard.hans@dlapiper.com

Daniel B Rehns drehns@cohenmilstein.com

David Daniel Hoff dhoff@tousley.com, efile@tousley.com

David M Balabanian david.balabanian@bingham.com

Dennis H Walters dwalters@karrtuttle.com, wbarker@karrtuttle.com

Floyd Abrams fabrams@cahill.com

Frank Busch frank.busch@bingham.com, frank.downing@bingham.com

Gavin Williams Skok gskok@riddellwilliams.com, dhammonds@riddellwilliams.com

Hal D Cunningham hcunningham@scott-scott.com, efile@scott-scott.com, halcunningham@gmail.com

Hollis Lee Salzman (Terminated) hsalzman@labaton.com, ElectronicCaseFiling@labaton.com

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

James J. Coster jcoster@ssbb.com, jregan@ssbb.com, managingclerk@ssbb.com

Joel P Laitman jlaitman@cohenmilstein.com

John D Lowery jlowery@riddellwilliams.com, dhammonds@riddellwilliams.com

John D Pernick john.pernick@bingham.com

Jonathan Gardner jgardner@labaton.com

Joseph A. Fonti (Terminated) jfonti@labaton.com, ElectronicCaseFiling@labaton.com

Joseph P Guglielmo jguglielmo@scott-scott.com, efile@scott-scott.com

Joshua M. Rubins jrubins@ssbb.com, jregan@ssbb.com, managingclerk@ssbb.com

Julie Hwang (Terminated) jhwang@labaton.com, ElectronicCaseFiling@labaton.com

Kenneth J Pfaehler kpfaehler@sonnenschein.com, nreeber@sonnenschein.com

Kenneth M Rehns krehns@cohenmilstein.com

Kerry F Cunningham kerry.cunningham@dlapiper.com

Kevin P Chavous kchavous@sonnenschein.com

Kim D Stephens kstephens@tousley.com, cbonifaci@tousley.com, kzajac@tousley.com

Larry Steven Gangnes gangnesl@lanepowell.com, docketing-sea@lanepowell.com, donnellyjossm@lanepowell.com, sebringl@lanepowell.com

Leslie D Davis ldavis@sonnenschein.com

Louis David Peterson ldp@hcmp.com, smp@hcmp.com

Mary Kay Vyskocil mvyskocil@stblaw.com

Michael H. Barr mbarr@sonnenschein.com

Mike Liles , Jr mliles@karrtuttle.com

Nancy A Pacharzina npacharzina@tousley.com, kzajac@tousley.com

Paul Scarlato pscarlato@labaton.com, ElectronicCaseFiling@labaton.com

Paul Joseph Kundtz pkundtz@riddellwilliams.com, mbergquam@riddellwilliams.com, mdowns@riddellwilliams.com

Richard F Hans richard.hans@dlapiper.com, dorinda.castro@dlapiper.com

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

Robert D Stewart stewart@kiplinglawgroup.com, cannon@kiplinglawgroup.com

Robert J Pfister rpfister@stblaw.com

Rogelio Omar Riojas omar.riojas@dlapiper.com, nina.marie@dlapiper.com

Serena Richardson (Terminated) srichardson@labaton.com, ElectronicCaseFiling@labaton.com

Stellman Keehnel stellman.keehnel@dlapiper.com, patsy.howson@dlapiper.com

Stephen M. Rummage steverummage@dwt.com, jeannecadley@dwt.com

Steve W. Berman steve@hbsslaw.com, heatherw@hbsslaw.com, robert@hbsslaw.com

Steven J Toll stoll@cohenmilstein.com, efilings@cohenmilstein.com

Steven P Caplow stevencaplow@dwt.com, belenjohnson@dwt.com

Tammy Roy troy@cahill.com

Timothy Michael Moran moran@kiplinglawgroup.com, cannon@kiplinglawgroup.com

Walter Eugene Barton gbarton@karrtuttle.com, danderson@karrtuttle.com, nrandall@karrtuttle.com

/s/ Nancy A. Pacharzina

Nancy A. Pacharzina, WSBA #25946
Kim D. Stephens, P.S., WSBA #11984
Email: kstephens@tousley.com
Liaison Counsel for the Class
TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-4416
Tele: 206.682.5600
Fax: 206.682.2992